87-826

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEROME F. GOLDBERG AND ROBERT MCTIGUE,
Appellants,

v.

ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May a State, consistent with the Commerce Clause, impose a tax on interstate telecommunications that is completely unapportioned, that subjects the telecommunications to multiple state taxation, that increases as the State's contact with the telecommunications decreases, and that lays a heavier burden on interstate telecommunications than intrastate telecommunications?

PARTIES TO THE PROCEEDINGS

Appellants Jerome F. Goldberg and Robert McTigue, plaintiffs before the Cook County Circuit Court and appellees before the Illinois Supreme Court, are residents of Illinois subject to the challenged state tax. Appellee Roger D. Sweet succeeded defendant J. Thomas Johnson as Director of the Illinois Department of Revenue. Appellee Jerry Cosentino succeeded defendant James H. Donnewald as Treasurer of the State of Illinois.

The following telecommunications companies were also named as defendants in the complaint: GTE Sprint Communications Corporation ("GTE Sprint"), MCI Telecommunications Corporation ("MCI"), Satellite Business Systems ("SBS"), Republic Telecom Corporation, U.S. Telecom Communications Services Company, American Telephone and Telegraph Company, Allnet Communications Services, Inc., Electronic Office Centers of America, Inc., Lexitel Corporation, Illinois Bell Telephone Company, International Telephone and Telegraph Corporation, TDX Systems, Inc., TMC Long Distance, and Western Union. GTE Sprint, MCI, and SBS filed counterclaims alleging that the tax at issue was unconstitutional; GTE Sprint also participated as an appellee before the Illinois Supreme Court.

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Appellees.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

Appellants Jerome F. Goldberg and Robert McTigue, individually and on behalf of all others similarly situated, appeal from the judgment of the Supreme Court of Illinois entered on June 24, 1987, and the opinion with respect to that judgment issued on July 27, 1987, sustaining the Illinois Telecommunications Excise Tax Act against the charge that it violates the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 117 Ill.2d 493, 512 N.E.2d 1262, and is reprinted in the appendix hereto ("App.") at 4a.

The findings of fact and conclusions of law of the Circuit Court of Cook County (Curry, J.) are unreported and are reprinted at App. 20a.

JURISDICTION

Appellants filed suit on August 13, 1985, contending that the Telecommunications Excise Tax Act, Ill. Rev. Stat. ch. 120, para. 2001-2021, contravened, *inter alia*, the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3, as well as the Due Process and Equal Protection Clauses. On October 21, 1986, the Circuit Court of Cook County (Curry, J.) granted summary judgment in favor of appellants, ruling that the Act violated the Commerce Clause and Equal Protection Clause of the United States Constitution. App. 18a-24a. The Director of Revenue appealed, and on June 24, 1987, the Illinois Supreme Court issued an order reversing the Circuit Court. App. 17a. On July 27, 1987, the four Justices of the Illinois Supreme Court who participated in the case issued a per curiam opinion with respect to that order. App. 4a. The Illinois Supreme Court denied a timely-filed petition for rehearing on October 5, 1987. App. 3a. On October 26, 1987, appellants filed their notice of appeal with the Illinois Supreme Court. App. 1a. The jurisdiction of this Court over the appeal rests on 28 U.S.C. § 1257(2).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *."

The full text of the Telecommunications Excise Tax Act, Ill. Rev. Stat. ch. 120, para. 2001-2021, is set forth at App. 25a.

STATEMENT OF THE CASE

Section four of the Illinois Telecommunications Excise Tax Act ("the Act") imposes a tax "upon the act or privilege of originating in this State or receiving in this State interstate telecommunications * * *." Ill. Rev. Stat. ch. 120, para. 2004. The tax is assessed at a flat rate of five percent "of the gross charge for such telecommunications purchased at retail," *id.*, and applies to all calls charged to an Illinois service address, regardless of where the calls are billed or paid. *Id.* para. 2002(a), (b). The retailer is required to collect the tax from the person who places or receives the call. The amount "required to be collected * * * constitute[s] a debt owed by the retailer to [the] State." *Id.* para. 2005. A similar tax is imposed on intrastate telecommunications, again at five percent of the gross retail charge. *Id.* para. 2003.

Thus, a call that is placed, transmitted, and received entirely in Illinois is taxed at five percent. A person placing a call in Illinois that is transmitted outside Illinois and received in Indiana, however, must also pay Illinois five percent of the cost of the *entire* call. If the same person places a call to Hawaii, or receives a collect call from Hawaii, he still pays Illinois a tax of five percent on the total cost of the call.

The section of the Act taxing interstate calls contains a credit provision "[t]o prevent actual multi-state taxation" of the calls. *Id.* para. 2004. A credit is allowed to an Illinois taxpayer who has paid the five percent charge, and who has filed a claim, but only "upon proof that *that taxpayer* has paid a tax in another state" on the same act or privilege subject to the Illinois tax. *Id.* (emphasis supplied).

Appellants Jerome F. Goldberg and Robert McTigue, Illinois residents subject to the tax on interstate telecommunications, filed a class action complaint on August 13, 1985, in Cook County Circuit Court, naming as defendants the Director of the Illinois Department of Revenue

and various long-distance telephone carriers tasked with collecting the tax. The complaint sought a declaration that section four of the Act violated, *inter alia*, the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution. Goldberg and McTigue also sought an injunction against continued collection of the tax, and an accounting and refund of taxes already collected in violation of the Constitution.

Several of the long-distance carriers responded by filing claims of their own against the Director, likewise seeking a declaration that the tax on interstate telecommunications was unconstitutional. Goldberg and McTigue moved for an order pursuant to Illinois law,[1] providing that the taxes collected under the statute be remitted under protest and retained in a special fund pending final disposition of the action. Certain of the long-distance carriers also urged the creation of such an escrow fund. The Circuit Court agreed and ordered the long-distance carriers to pay under protest all taxes collected pursuant to section four to the Director, who was in turn ordered to retain the monies in a segregated protest fund until final disposition of the suit. At the time judgment was entered by the court below, there were over 142 million dollars in the protest fund,[2] and payments continue to be made into it at the rate of approximately ten million dollars per month.

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[1] The State Officers and Employees Money Disposition Act, Ill. Rev. Stat. ch. 127, para. 172.

[2] Six days after the Illinois Supreme Court entered its judgment, the Illinois General Assembly passed Public Act 85-14, authorizing the State Treasurer to transfer monies from the protest fund to the State's General Revenue Fund, citing the instant lawsuit by name, and providing that "[i]f a final nonappealable order of a court of competent jurisdiction declares [the Act being challenged in *Goldberg* v. *Johnson*] void or unconstitutional, the General Assembly shall appropriate" sufficient funds to restore the monies taken from the protest fund created in this case. The repayment provisions relate only to the case at bar. Over the objection of

Acting upon cross-motions for summary judgment, the Circuit Court concluded that section four was unconstitutional. The court began its analysis by rejecting the State's argument that the tax did not implicate the Commerce Clause because it was imposed only on a local purchase or sale. The court held that the words of the statute "unmistakably mean that the taxable transaction is the interstate phone call" and that "it strains both common knowledge and common sense to characterize an interstate phone call in terms of an Illinois sale at retail and thereby ignore the realities of its interstate participant and the interstate communication system over which it has taken place." App. 20a-21a. The court concluded that the mere fact that the call is charged to an address in Illinois "cannot serve to make local that which is unmistakenly interstate." App. 22a. Indeed, the court reasoned, the fact that the legislature had laid its tax on the gross charge for the call "makes it clear that the call itself and not its billing in Illinois is what is really being taxed and that event is an interstate activity." App. 21a.

Having determined that Illinois intended to tax interstate commerce, the court then tested that tax by the standards set by this Court. It concluded that the Illinois tax on interstate telecommunications "fails to meet at least three of the four criteria set out in the Supreme Court decision of *Complete Auto* v. *Brady*, 430 U.S. 274." App. 22a. The court held:

> Illinois is attempting to tax the entire cost of an interstate act which takes place only partially in Illinois. This tax by its own terms is not fairly appor-

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appellants as to the constitutionality of this legislation and procedure, the four Justices of the Illinois Supreme Court who participated in this case issued an order on August 27, 1987, allowing the Treasurer to transfer some 117 million dollars out of the protest fund, and furthermore allowing transfer out of the fund of all payments thereafter made into it by MCI, AT&T, and Illinois Bell Telephone Company.

> tioned. It discriminates against interstate commerce and it is not related to services provided in Illinois. [App. 24a.]

"For all these reasons," the court concluded, "the Act must fail." App. 24a.[3]

The state defendants appealed directly to the Illinois Supreme Court. On June 24, 1987, that court issued an order and judgment declaring that the Act was constitutional and reversing the contrary judgment of the Circuit Court. App. 17a. The order stated:

> This announcement is made at this time because of the public importance of this revenue litigation. An opinion setting forth the reasons for the Court's judgment will be completed and filed at a later date. [App. 17a.]

On July 14, 1987, GTE Sprint filed a timely petition for rehearing, urging the Illinois Supreme Court to reconsider its as yet unexplained judgment in light of two new decisions of this Court issued the day before that judgment, *American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. 2829, and *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 107 S. Ct. 2810.

Instead, on July 27, 1987, the four members of the Illinois Supreme Court who participated in the case issued a per curiam opinion with respect to the prior judg-

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[3] The Act provides that "[i]f Section 4 * * * is declared unconstitutional or invalid, no part of this [Act] shall be effective." Ill. Rev. Stat. ch. 120, para. 2021. The Circuit Court also held that the Act violated the Equal Protection Clause, because "it taxes only those who pay for the call and not those whose calls are paid for by others." App. 21a. In addition, the Circuit Court denied a motion by Goldberg and McTigue for class certification. App. 19a. Although it acknowledged that all the prerequisites for class certification were met, the court concluded that a class action was unnecessary because all the monies in dispute were segregated in the protest fund and available for distribution to taxpayers. *See* App. 7a.

ment. App. 4a. The court began by rejecting the State's principal argument on appeal and agreeing with the Circuit Court that "the fact that section 4 establishes the purchase price of an interstate telecommunication as the basis upon which the tax is calculated does not transform the taxable event into a retail purchase * * *." App. 9a. The court concluded that

> it is clear that the taxable event is linked inextricably to interstate activity—interstate communication. A person simply cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions culminating in interstate communication. * * * The very process of interstate telecommunication is interstate commerce. [App. 9a.]

Contrary to the Circuit Court, however, the court below held that this state tax on interstate telecommunication satisfied the requirements of *Complete Auto* that the tax be "fairly apportioned," that it "not discriminate against interstate commerce," and that it be "fairly related to the services provided by the [taxing] State." [4]

The court acknowledged that the tax "is not an apportioned tax," since it "applies to the entirety of each and every interstate telecommunication." According to the court below, however, "the fact that [a tax] is unapportioned is not constitutionally significant" so long as it "avoids * * * the pitfall" of "multiple taxation." App. 10a-11a.

The court thought that there was no danger of multiple taxation with respect to interstate calls originated in Illinois because "no other taxing entity could levy a tax on this taxable event." App. 11a. The court believed, how-

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[4] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). There is no dispute that the first prong of the *Complete Auto* test—that the tax be "applied to an activity with a substantial nexus with the taxing state," *id.*—was satisfied in this case.

ever, that calls received in Illinois and charged to an Illinois address did present "a real risk of multiple taxation." App. 12a. Indeed, the court noted that the record revealed that at least two jurisdictions outside Illinois taxed such calls. The court acknowledged that "[c]learly, this is multiple taxation of the same interstate taxable event which would be prohibited by the commerce clause, as interpreted by *Complete Auto* and its progeny * * *." App. 12a. The tax was saved from this fate, in the eyes of the court below, solely because "section 4 provides a credit against any tax due from a taxpayer who has paid two or more taxes on the same interstate telecommunication." App. 13a.

In light of the foregoing, the court below concluded that the tax was valid even though unapportioned. The court also concluded that the absence of multiple taxation was sufficient to satisfy the third prong of the *Complete Auto* test—that the tax not discriminate against interstate commerce.

Turning to the fourth prong of the *Complete Auto* test, the court held that the tax was fairly related to benefits provided by Illinois. The court recognized that "the State is taxing the 'gross charge' of the entire telecommunication even though the benefits it affords are limited to that portion of the communication occurring within the State." App. 13a. The court concluded, however, that "the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits extended by Illinois." App. 13a.[5]

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[5] The court also reversed the Circuit Court's holding that the Act violated the Equal Protection Clause. App. 14a-16a. Although appellants continue to believe that the conclusion of the Circuit Court was correct on this point, we do not seek review of that question by this Court. In light of the ruling by the court below on the merits, that court vacated as moot the Circuit Court order denying class certification. App. 16a. No issues regarding class certification are before this Court.

On October 5, 1987, the Illinois Supreme Court denied the petition for rehearing. App. 3a. Goldberg and McTigue filed their notice of appeal to this Court with the Illinois Supreme Court on October 26, 1987. App. 1a.

THE QUESTION PRESENTED IS SUBSTANTIAL

This Court's decision in *Complete Auto Transit, Inc.* v. *Brady, supra*, gave practical effect to the proposition, long before recognized by the Court, that interstate commerce may be required to pay its "just share" of the tax burden of the States. 430 U.S. at 279 (citing *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938)). But to ensure that interstate commerce pays *no more* than its "just share," *Complete Auto* required that each State (1) tax no more than the portion of the interstate commerce fairly allocable to it, (2) not impose taxes that effectively discriminate against interstate commerce, and (3) measure the tax in some relation to services provided by the State. 430 U.S. at 279. These three requirements, together with the basic requirement that there be a "substantial nexus" between the interstate commerce and the taxing State, make up the four-part standard by which all state taxes on interstate commerce are judged. To withstand scrutiny under the Commerce Clause, a state tax must satisfy each of these four separate requirements.

This appeal presents the question of how the *Complete Auto* standard, which evolved largely from decisions concerning traditional interstate trade in goods and services, applies to a tax on modern interstate telecommunications. In sustaining the Illinois tax, the court below not only misapplied all three of the pertinent *Complete Auto* requirements, it also misunderstood the purpose of those requirements.

There is no question that the tax challenged in this case is levied directly on interstate commerce and is to-

tally unapportioned: Illinois taxes the entire value of an interstate activity whose value is not—and by definition *cannot* be—attributed solely to Illinois. Contrary to the lower court's view, other States can and do tax this interstate commerce, subjecting such commerce to multiple taxation. The fact that the multiple taxation is not always on the same taxpayer is irrelevant; the resulting economic burden on the interstate commerce is the same regardless of who ultimately pays the cost of that burden.

Nor did the lower court grasp—indeed it did not even address—the discriminatory impact of the challenged tax. Illinois not only subjects interstate telecommunications to multiple state tax burdens not faced by intrastate telecommunications, but even if no other State taxed these interstate communications, Illinois requires them to pay a higher price than does purely local commerce for the *same* state services.

Furthermore, the tax is not only not fairly related to services provided by the taxing State, it is actually *inversely* related to such services. As the interstate component of an interstate telecommunication grows and the local aspect diminishes, the tax imposed by Illinois *rises*. For all these reasons, the lower court's decision to sustain the tax marks a dramatic departure from important Commerce Clause principles established by this Court.

Significantly, this departure directly affects the most burgeoning area of interstate commerce. The Illinois law is not restricted to the familiar long-distance telephone call, but embraces all types of modern telecommunications, including

> private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by elec-

> tronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. [Ill. Rev. Stat. ch. 120, para. 2002(c).]

The scope of the Act is limited only by the seemingly boundless range of technological innovation in the telecommunications field. These evolving instrumentalities of interstate commerce may, of course, be made to pay their "just share" of the tax burden of the States. But Illinois wants it all. It taxes the entire value of an interstate telecommunication, even though other States contribute to that value. Under such an approach, the vitality of this important industry will be unfairly—and unconstitutionally—burdened. This Court should note probable jurisdiction to confirm that the Commerce Clause limits the reach of state taxing authorities over interstate commerce in computer pulses, no less than in widgets.

I. The Illinois Tax Violates The Commerce Clause

A. The Tax Is Unapportioned And Subjects Interstate Commerce To Multiple Taxation

If a single commercial activity that takes place in several States at once were subject to taxation by each State on its full value, it would bear a burden of multiple taxation that the same activity occurring locally would be spared. The imposition of such a burden—solely because the activity crosses state lines—contravenes the Commerce Clause. To avoid this unconstitutional burden, the Court has required the States to apportion their taxes on interstate commerce according to that part of the commerce occurring within their borders.

The Court reviewed the basis of this apportionment requirement in *Japan Line, Ltd.* v. *County of Los Angeles*, 411 U.S. 434, 446-447 (1979) (citations omitted):

> It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the

> Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full.

Here there is no question that Illinois taxes the "instrumentality of commerce"—the interstate telecommunication—in full.[6] Illinois allocates the entire value of the interstate call to itself—whether the call originates in Illinois or is received there—whenever the call is charged to an address in Illinois. That happenstance, however, does nothing to alter the fact that the value of the call is derived from activities in other States, and is not attributable solely to Illinois.

As the Court noted in *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 444 (1980), "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate * * *." *Mobil Oil* concerned an apportioned Vermont income tax. Vermont sought to reach its apportioned share of dividend income received by the taxpayer, a New York corporation, from foreign affiliates and subsidiaries. The taxpayer argued that the dividends could not be included in the income subject to apportionment, but must be *allocated* to New York, under the traditional rule that dividends are fully taxable at the commercial domicile or business situs. *See id.* at 436, 443-444. The Court disagreed, and upheld the apportionment:

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[6] The ruling of the Illinois Supreme Court on the interpretation of the state law definitively settled the question whether the statute was intended to levy a tax on the interstate telecommunication itself or, as the state defendants argued below, on a retail purchase in Illinois. In light of the Illinois Supreme Court's construction of the governing state law, the tax is unquestionably imposed on the interstate telephone call itself, not on the purchase or sale of telephone services. *See* App. 8a-9a.

> [W]e may assume * * * that the State of commercial domicile has the authority to lay some tax on * * * dividend income * * *. But there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. *These are the circumstances in which apportionment is ordinarily the accepted method.* [*Id.* at 445-446 (emphasis supplied).]

Here too the cost of the interstate call charged to an address in Illinois reflects value from a single activity conducted in other States as well as Illinois. All of the value should not, therefore, be allocated to Illinois for taxation. In *Mobil Oil* this Court specifically noted that "we reject the suggestion that anything is to be gained by characterizing the receipt of the dividends as a separate 'taxable event.'" *Id.* at 440. So too here the fact that the call is charged to an Illinois address cannot justify that State's arrogating to itself the right to tax the entire value of the indivisible interstate activity.[7]

Similarly, in *Exxon Corp.* v. *Department of Revenue of Wisconsin*, 447 U.S. 207 (1980), Wisconsin sought to include in its apportioned income tax income from the taxpayer's oil exploration and production activities in other States. The taxpayer argued that its income from exploration and production should not be subject to apportionment but must be allocated to the situs State. This Court disagreed, holding that "[t]he geographic

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[7] As the trial court noted:

> The sending or receiving of an interstate message when taken alone clearly has interstate significance and a tax on such would need be apportioned. Does the added factor of an Illinois payment negate the interstate aspect and cause a transaction then to become a local event for which no apportionment is required? I really think not. The payment is a mere incident of the underlying transaction and cannot serve to make local that which is unmistakenly interstate. [App. 22a.]

location of * * * raw materials does not alter the fact that [income from exploration and production] is part of the unitary business of the interstate enterprise and is subject to fair apportionment among all States to which there is a sufficient nexus with the interstate activities of the business." *Id.* at 230.

So too here the "geographic location" of the charging of the interstate call does not alter the fact that the total value taxed is derived from activities in other States. Since those States—including the State of receipt when Illinois taxes origination, or of origination when Illinois taxes receipt—may tax their fair share of that value, Illinois may not tax it all. "The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447.

These apportionment principles apply to telecommunications, just as they did to the commerce addressed in *Mobil Oil*, *Exxon*, and *Japan Line*. Indeed, nearly 60 years ago, on the eve of the initial explosion in interstate telecommunications, this Court first required telephone companies to apportion the costs of their common facilities between the interstate and intrastate aspects of their business, so that rates could be appropriately set for each. *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). In *Smith*, the District Court had found that interstate long distance telecommunication then made up a miniscule percentage of the total use of the local network facilities: one-half of one percent of all originated calls. *Id.* at 147. It therefore had decided that "as a matter of convenience, in view of the practical difficulty of dividing the property between the interstate and intrastate services," such apportionment was not required. *Id.* at 150. This Court unanimously reversed, concluding that whatever the practical difficulties of separating costs, such separations were required to avoid discrimination: "While the difficulty in making an exact apportionment of

the property is apparent, and extreme nicety is not required, only reasonable measures being essential, *it is quite another matter to ignore altogether the actual uses to which the property is put.*" *Id.* at 150-151 (emphasis supplied) (citations omitted).

The *Smith* decision still guides the telecommunications industry today. After *Smith*, the States, the FCC, and telephone companies developed standard methodologies for apportioning the costs of property between interstate and intrastate, generally based on relative usage of the specific facilities.[8] These apportionment principles necessarily make use of reasonable assumptions and estimates which have been adjusted over time as interstate long-distance service has developed from an expensive luxury to a commonplace of modern life. But the core necessity of apportionment of costs has always been observed.[9]

A similar apportionment of State taxes on interstate calls is necessary to satisfy the Commerce Clause and could be similarly accomplished by the industry. A typical interstate call has three distinct segments: local originating access in State A, long-distance transmission from State A to State B (perhaps crossing several intermediate States), and local terminating access in State B. Significantly, each of these segments uses separate facilities and involves separate charges, even though the charges are usually bundled together when billed. The local telephone company in State A provides originating access service for the call and bills the long-distance carrier for that service at its tariff rates; the local telephone company in State B similarly provides the terminating access at its own different rates. The long-distance car-

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[8] These methodologies are set forth at 47 C.F.R. Part 67. *See* Report and Order, 2 FCC Rcd 1298-1300 (1987).

[9] Similarly, the FCC has prescribed rules to govern the further allocation of interstate costs among various services, while the States regulate the recovery of intrastate costs. *See* Notice of Proposed Rulemaking, 2 FCC Rcd 5208-5210 (1987).

rier then charges the customer the sum of the originating and terminating access rates plus its own rate for the interstate transmission segment. *See generally NARUC* v. *FCC*, 737 F.2d 1095, 1103 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985).

The Illinois tax violates the Commerce Clause because it applies to the gross charge paid by the customer for all three segments of a call, with no effort to limit the tax to those portions fairly allocable to Illinois. Illinois need only have made a reasonable attempt to apportion its tax in order to satisfy its constitutional obligation.[10] But it did not even make an attempt here; instead the State overreached to tax services provided in the other 49 States as well.

Indeed, the court below did not dispute that the Illinois tax was wholly unapportioned and accordingly "constitutionally suspect because of the risk of multiple taxation." App. 11a. Confusing the fair apportionment and nondiscrimination prongs of the *Complete Auto* test, however, the court stated that "[i]f the tax avoids the pitfall of multiple taxation, or the risk of such taxation, it is nondiscriminatory; and, the fact that it is unapportioned is

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[10] Other States have made attempts to apportion their taxes on interstate telecommunications, not with mathematical precision, but on the basis of what appear to be rough estimates as to appropriate apportionment. For instance, Florida applies its tax on interstate privateline communications to only 50 percent of the charges for such interstate service "between the first channel termination point inside the State and the nearest channel termination point outside the State." Fla. Stat. Ann. § 212.05(1)(e)2c. Similarly, New Mexico provides that its gross receipts tax on interstate telecommunications shall apply to 65 percent of receipts from long-distance interstate and foreign calls that either originate or terminate in New Mexico and are billed to a New Mexico account or number. N.M. Stat. Ann. § 7-9-56(C). Virginia applies its gross receipts tax on interstate telecommunications on the basis of a comparison of the carrier's circuit capacity in Virginia with its capacity system-wide. Va. Code §§ 58.1-2623 and 58.1-2624. *See also American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. at 2847.

not constitutionally significant." App. 11a. In so ruling, the court below erred in several regards. First, the ruling is directly contrary to this Court's decision in *Complete Auto*. *Complete Auto* requires that a challenged tax satisfy *all four* prongs of the test, not three out of four as the court below concluded. Moreover, the court below was clearly wrong to suppose that a tax that avoids the risk of multiple taxation is necessarily nondiscriminatory and need not be apportioned.[11] Finally, even under the theory that the apportionment requirement can be waived if the tax is "nondiscriminatory," the court below erred because the Illinois tax *does* discriminate against interstate commerce, *see infra*, and because it *does* present a palpable risk of multiple taxation.

The lower court concluded there was no risk of multiple taxation with respect to interstate calls *originated* in Illinois because it believed that "no other taxing entity could levy a tax on this taxable event." App. 11a. With regard to interstate calls *received* in Illinois, the court acknowledged "a real risk of multiple taxation" and noted that the record established that at least two other jurisdictions levied taxes on interstate calls already taxed on their full value by Illinois. App. 12a. The court nonetheless sustained the tax, ruling that the Act's credit provision "cures any possible constitutional infirmity resulting from multiple taxation." App. 13a.

In finding no danger of multiple taxation with respect to calls originating in Illinois, the court below lost sight of its own ruling that the tax was levied on interstate commerce, and was not a tax on a purely local event. App. 8a-9a. While it is of course true that a call originating in Illinois cannot also originate in another State,

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[11] A fairly apportioned tax may be struck down as discriminatory, *see Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984), and a nondiscriminatory tax may be struck down because of the risk of multiple taxation. *See Japan Line, Ltd.* v. *County of Los Angeles, supra.*

other States *can* levy taxes on that same interstate telecommunication, of which the origination is only a part. It is certain that for every interstate call originating in Illinois, at least one other State has a sufficient nexus with that call to impose a tax of its own.[12] This fact presents an impermissible risk of multiple taxation and precludes Illinois' unapportioned tax.[13]

Moreover, contrary to the lower court's view, Illinois' credit provision does not avoid the threatened multiple taxation. The credit is only available when the same taxpayer pays both taxes. Ill. Rev. Stat. ch. 120, para. 2004. Nothing in the credit provision prevents multiple taxation of the interstate telecommunication itself, a burden from which the purely local telecommunication is spared. The court below apparently thought that so long as each State imposed its tax on a different taxpayer, the full value of interstate commerce could be repeatedly subjected to taxation. That is not the law.

This Court's Commerce Clause cases are concerned with whether *interstate commerce* has been permissibly

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[12] Whether or not other States are in fact now taxing calls that originate in Illinois is not constitutionally relevant. The risk of multiple taxation, not the fact, is sufficient to preclude an unapportioned tax. Otherwise, the constitutionality of each State's tax laws "would depend on the shifting complexities of the tax codes of 49 other States, and * * * the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984). *See Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 107 S. Ct. at 2820. Moreover, even if other States chose to "forego * * * entirely" their right to tax the value of interstate calls occurring within their borders, this would hardly authorize Illinois to tax that value for itself. *Cf. American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. at 2840 n.15.

[13] *See Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 662-663 (1948) (New York may not impose an unapportioned tax on a bus trip through New York, New Jersey, and Pennsylvania, whether or not New Jersey and Pennsylvania tax the portions of the trip over their roads).

taxed, not with who ultimately pays the tax. *See, e.g., Evansville-Vanderburgh A.A. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 714-715 (1972) ("Our inquiry is whether the use of airport facilities occasioned by enplanement is a permissible incident on which to levy * * * fees, regardless of whether the airline or its passengers bear the formal responsibility for their payment"); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 n.8 (1984) ("Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers"); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447 (apportionment required to ensure that "no *instrumentality of commerce* is subjected to more than one tax on its full value") (emphasis supplied). Regardless of which taxpayers bear the economic cost of multiple taxation of interstate calls,[14] the economic effect will be the same: the cost of interstate calls will be raised relative to intrastate calls and interstate commerce will thereby be unfairly burdened.[15] As the Court reiterated in *Armco Inc.* v. *Hardesty*, "'[i]f another State has taxed the same *interstate transaction*, the burdensome consequences to interstate trade are undeniable.'" 467 U.S. at 645 n.8 (emphasis supplied) (quoting *Freeman* v. *Hewitt*, 329 U.S. 249, 256 (1946)).[16]

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[14] As noted, Illinois requires long-distance carriers to remit any tax due from the taxpayer, whether or not the taxpayer actually pays the tax. No credit is provided such a carrier even if it pays an additional tax to another State.

[15] This Court has repeatedly recognized that the overall "economic effect" of a State's tax is the appropriate focus. *See, e.g., Westinghouse Electric Corp.* v. *Tully*, 466 U.S. at 404.

[16] The Court long ago recognized that "where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury." *Telegraph Co.* v. *Texas*, 105 U.S. 460, 465 (1881). The Circuit Court was

In the case of interstate telecommunications, it is particularly appropriate to focus on the "instrumentality of commerce"—the interstate telecommunication itself—rather than the individual taxpayers at either end of the line. An interstate telecommunication is a single, simultaneous, indivisible event; there is no origination without receipt, no receipt without origination. While a State may be free to tax the entire value of manufacturing that occurs within the State, or the entire value of wholesaling, that is because manufacturing and wholesaling can be regarded as "separate activit[ies] conducted wholly within [the State] that no other State has jurisdiction to tax." *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 107 S. Ct. at 2822. The origination of an interstate call, its transmission, and its receipt cannot similarly be regarded as separate activities or distinct taxable events. They are, rather, inextricably linked aspects of a single instrumentality of interstate commerce, and the risk of multiple taxation must be considered from the perspective of *that* instrumentality, not that of the individual taxpayers who participate in it. So considered, there can be no question that the unapportioned Illinois tax subjects interstate commerce to multiple taxation.

B. The Tax Discriminates Against Interstate Commerce

The lack of apportionment of the Illinois tax "is a form of discrimination against interstate commerce." *Armco Inc.* v. *Hardesty*, 467 U.S. at 644. This is because the tax subjects interstate calls to multiple taxation that local calls need not bear. But that is not the only form of discrimination effected by the challenged tax. The court below assumed that the Illinois tax did not discriminate against interstate commerce simply because

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clearly correct, therefore, when it held that "[t]he relevant inquiry is as to just what is being taxed and not who is being taxed * * *." App. 21a.

Illinois taxed interstate and intrastate telecommunications at the same rate. App. 11a. As this Court emphasized in a recent opinion, however—an opinion that was not available to the court below when it issued its judgment—"the Commerce Clause has a deeper meaning that may be implicated even though state provisions * * * do not allocate tax burdens between insiders and outsiders in a manner that is *facially* discriminatory." *American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. at 2839 (emphasis supplied). In practice, Illinois' application of the same rate to all telephone calls *ensures* discrimination, since Illinois necessarily provides greater services with respect to intrastate than interstate calls. The net result is that the interstate call is subject to greater taxation for the same services.

A variety of examples illustrate the inherent discrimination. Take two calls from Chicago, one to Joliet, Illinois, and the other to Gary, Indiana. Assume both calls cost two dollars. Each call is taxed ten cents by Illinois. Illinois provides origination, complete transmission, and receipt services for the intrastate call for that ten cents. The interstate call is subject to the same ten-cent tax but receives only origination and partial transmission services from the taxing State for its dime. It therefore pays more for those same services than the interstate call.

The discrimination is inherent in the statute, since the Act imposes the same tax on interstate calls even though the State necessarily provides fewer services for such calls. This discrimination is more dramatically illustrated by considering a call from Chicago to a town on the western border of Illinois, costing, say, two dollars, and a call from Chicago continuing on from that town on the western border to Los Angeles, costing, say, five dollars. Both calls originate at the same point in Illinois and both are carried the same distance through Illinois. But the intrastate call is taxed ten cents for this service

and the interstate call is taxed 25 cents. Because Illinois imposes a higher charge on interstate calls for the same services (a result attributable to its taxing of activities beyond its borders), the charge necessarily discriminates in favor of purely local activity.

This Court confronted a similar problem in *Scheiner*. There Pennsylvania imposed the same axle tax on all vehicles, whether registered in Pennsylvania or outside the State. The lower court, like the court below here, sustained the tax as nondiscriminatory.[17] This Court reversed, finding that the facially neutral tax discriminated against the vehicles in interstate commerce: "In practical effect, since they impose a cost per mile on appellants' trucks that is five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." 107 S. Ct. at 2841. So too here: the imposition by Illinois of the same flat tax on intrastate and interstate telecommunications results in a higher proportional cost being imposed on the interstate telecommunications. Such a result is "plainly discriminatory." [18]

Thus, the Illinois tax discriminates against interstate commerce in two ways: first, by subjecting interstate calls to multiple taxation, it burdens those calls with costs that will not be borne by intrastate calls; second, even if no other State imposed a tax on the interstate calls, Illinois' flat tax on all calls imposes a heavier burden on interstate calls for the same State services. Such discrimination is prohibited by the Commerce Clause.

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[17] *Compare* App. 11a *with* 107 S. Ct. at 2838.

[18] Moreover, the less contact Illinois has with a particular interstate call, the more discriminatory its treatment of that call will likely become. Given that longer interstate calls ordinarily carry a higher retail charge, the smaller a call's proportional contact with Illinois the greater will be Illinois' tax. Conversely, in the case of the generally less expensive intrastate calls, where Illinois' contact is exclusive and its services at their apex, the tax will necessarily be less than for interstate calls, due to the constant five percent rate.

C. The Tax Is Not Fairly Related To Services Provided By Illinois

The fourth prong of the *Complete Auto* test requires that the tax on interstate commerce be "fairly related to the services provided by the State." 430 U.S. at 279. The "fair relation" element of the test demands that

> the *measure* of the tax must be reasonably related to the extent of the contact [with the taxing State], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden." [*Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (emphasis in original) (quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. at 254).]

Here the measure of the tax is not at all related to the extent of contact with the taxing State. On the contrary, the measure is *inversely* related to the extent of contact; *i.e.*, as the contact of the interstate commerce with Illinois diminishes, the tax on that commerce increases.

This perverse result is a necessary consequence of the flat five percent tax and the State's decision to allocate to itself the entire value of interstate telecommunications. A simple example will highlight the problem. The tax on a one-dollar call from Chicago to an Iowa town just over the border is five cents. The tax on a five-dollar call from Chicago to Los Angeles—involving proportionally much *less* contact with Illinois—is 25 cents. As the interstate aspects of the commerce grow, Illinois demands a *greater* tax based on the proportionally *diminishing* contact with Illinois. Since the measure of the tax is based on the entire value of the interstate telecommunication—including value attributed to activities outside Illinois—the greater the significance of those out-of-state activities, the higher the tax for the in-state activities. Accordingly, the Illinois tax, like the taxes at issue in *Scheiner*,

> does not vary with miles traveled or with some other proxy *for value obtained from the State*. "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." [*Scheiner*, 107 S. Ct. at 2844 (emphasis supplied) (quoting *Commonwealth Edison Co.* v. *Montana*, 453 U.S. at 629).]

The court below dismissed the fair relation requirement with reasoning that was internally inconsistent. It argued that the services provided by Illinois "facilitate perhaps the most critical step in the taxable event—interstate origination," and "the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits provided by Illinois." App. 13a. But of course the same Illinois tax also applies when the "most critical step"—origination—occurs *outside* Illinois, when the benefits provided by Illinois are, in the court's own words, "too speculative to override the substantial benefits provided by" the State of origination.[19]

In any event, even if the services provided by the originating State were more substantial than those provided by the receiving State, that fact would not allow Illinois to tax the full value of calls originating within its borders. The question is not whether the out-of-state benefits "override" the benefits provided by Illinois; the question rather is whether Illinois has devised a tax that fairly measures the benefits that *it* provides. As shown, Illinois has not. The lower court's contradictory reason-

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[19] Moreover, the lower court's suggestion that the various activities in interstate telecommunications other than origination involve "speculative" state benefits is wholly without merit. Those activities are well-known and documented, and implicate contacts with the State that are as significant as origination. *See supra* at 15-16.

ing cannot justify the perverse, discriminatory rule Illinois has adopted against interstate commerce.[20]

II. The Question Presented Has Broad Significance For Interstate Telecommunications And State Tax Practices

The Nation, indeed the world, is in the midst of a telecommunications revolution. Numerous private companies now compete for a share of the ever-expanding long-distance market, with long-distance traffic growing at an average annual rate of 13 percent since 1984.[21] The com-

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[20] Other state courts have struggled to apply Commerce Clause analysis to telecommunications technology that is changing by the moment. In 1980 the Alaska Supreme Court concluded that a local governmental body could constitutionally impose a tax on the entire gross charge for interstate telephone calls. *Douglas* v. *Glacier State Telephone Co.*, 615 P.2d 580. Although *Douglas* was decided three years after this Court's decision in *Complete Auto*, the Alaska court rendered its Commerce Clause analysis without so much as a citation to *Complete Auto*. Further, the ruling in *Douglas* was based upon the premise that the taxpayer had to demonstrate "a tangible likelihood" that multiple taxation would result; three years later in *Armco* this Court established that this was not the test. Five years after *Douglas*, a Wisconsin intermediate appellate court relied upon *Douglas* to sustain a Wisconsin state statute, without citation or reference to *Armco*. *Wisconsin Telephone Co.* v. *Wisconsin Department of Revenue*, 125 Wis.2d 339, 371 N.W.2d 825 (Wis. Ct. App. 1985).

Other courts have more successfully analyzed the Commerce Clause problem posed by interstate telecommunications. In *General Data Corp.* v. *Porterfield*, 21 Ohio St.2d 223, 257 N.E.2d 359 (1970), the Ohio Supreme Court struck down on Commerce Clause grounds a tax on the monthly charge paid for the use of computer terminals linked to a nationwide computer network located outside Ohio. Similarly, in *South Cent. Bell Telephone Co.* v. *Celauro*, 735 S.W.2d 228 (Tenn. 1987), the Tennessee Supreme Court allowed an "end-user charge" to be assessed against local telephone users in connection with their long-distance telephone service only because that charge was fairly apportioned to the services rendered in Tennessee.

[21] P. Wynns, *AT&T's Share of the Interstate Switched Market*, at 5, Table 1 (Oct. 21, 1987) (Industry Analysis Division, Common

panies offer a constantly expanding menu of personal and business telecommunications services, services that disdain state borders. A call from one State received in another can be transferred to a third, and automatically charged to an account in a fourth. Conference calls can simultaneously link speakers in six or more different States.

Yet such business and personal interstate voice communication is merely the most familiar feature of the expanding telecommunications network that has caused this to be dubbed the "Information Age." Documents can now be transmitted across the country or around the globe in an instant; the telecopier, telex, or facsimile machine is now as familiar an office fixture as the typewriter once was. Computer terminals around the world are linked by the telecommunications network. Through computer telecommunications, a trader on the Chicago Commodities Exchange can instantly link a Los Angeles buyer and New York seller. Even so mundane a task as legal research is now facilitated by interstate telecommunications, with search requests in Washington instantly linked by telecommunications to data libraries in Ohio, Minnesota, and elsewhere. A recent study prepared for the Department of Justice found that such interactive data applications are growing as much as 50 percent per year, and concluded that "the market appears poised to develop packet and other data communications facilities comparable in scope to existing voice networks." [22]

The fees generated by such interstate telecommunications can be staggering. Revenue from interstate telecommunications increased from 32 billion dollars in 1982

Carrier Bureau, FCC). Total service minutes have increased from 37.5 billion in the third quarter of 1984 to 52.4 billion in the second quarter of this year. *Id.*

[22] P. Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, at 5.1.

to over 40 billion dollars in 1985.[23] This large and growing source of revenue could not long escape the notice of States searching for new revenue in an era of economic austerity and declining federal assistance. As noted, the protest fund established by the Circuit Court contained over 142 million dollars in revenue collected pursuant to the challenged tax at the time of judgment below, and some ten million dollars are added to the fund each month.

This is a test case; it clearly warrants plenary review under 28 U.S.C. § 1257(2). The subject of interstate telecommunications taxation has become a principal focus of taxing authorities throughout the country,[24] and it is clear that taxes on interstate telecommunications—of all sorts—will proliferate as state and local taxing authorities intensify their search for new sources of revenue. The Tax Injunction Act, 28 U.S.C. § 1341, largely ensures that this Court is the only federal court that can consider the serious questions presented by state taxation of interstate telecommunications. Dismissal of this appeal for want of a substantial federal question would, of course, constitute a ruling on the merits.[25] If this Court sustains the Illinois tax in such summary fashion, other States

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[23] Multinational Business Services, Inc., *Competition in the Long Distance Telecommunications Market: An Industry Structure Analysis* (Oct. 1987).

[24] *E.g.*, *The Taxation Of Telecommunications: In Ohio*, NATA Conference on Revenue Estimating, November 1-4, 1987; *Unitary Method, Florida Sales Tax, Telecommunications Taxes Focus of MTC Meeting*, 36 Tax Notes, No. 3, p. 249, July 20, 1987; *The Challenge Of Telecommunications: State Regulatory And Tax Policies For A New Industry*, edited by Barbara Dyer, December 15, 1986; *Final Report Of The Connecticut Telecommunications Task Force*, Finance, Revenue and Bonding Committee, Connecticut General Assembly, January 1986; *Florida Telecommunications Task Force Final Report To Governor Bob Graham And The Florida Legislature*, February 1, 1985.

[25] *See Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

will rush to claim their equal right to levy taxes on the entire value of interstate telecommunications. The end result—multiple taxation of a single instrumentality of interstate commerce—would be "destructive of the free commerce anticipated by the Constitution." *Maryland* v. *Louisiana*, 451 U.S. 724, 754 (1981). Interstate telecommunications may be made to pay their fair share of the State tax burden, but they cannot—consistent with the Commerce Clause—be made to pay more.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

No. 64355

JEROME F. GOLDBERG and ROBERT MCTIGUE, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants

v.

J. THOMAS JOHNSON, Director of Revenue for the Department of Revenue of the State of Illinois,
Defendant-Appellant

and

GTE SPRINT COMMUNICATIONS CORPORATION, *et al.*,
Defendants

Direct Appeal From The Circuit Court of Cook County, Chancery Division

No. 85 CH 8081

The Honorable Richard L. Curry, Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Oct. 26, 1987]

TO: All persons on the attached service list

Plaintiffs-Appellees Jerome F. Goldberg and Robert McTigue, individually and on behalf of all others similarly situated, hereby appeal to the Supreme Court of the United States from the judgment of this Court as set forth in its Order of June 24, 1987 and its Opinion issued with respect thereto on July 27, 1987, as to which this Court issued its Order of October 5, 1987 denying the pending Petition For Rehearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ John G. Jacobs
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APPENDIX B

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October 5, 1987

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No. 64355—Jerome F. Goldberg, et al., etc., appellees, v. J. Thomas Johnson, Director of Revenue, etc., et al., appellants. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on January 21, 1988.

APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

Docket No. 64355

Agenda 30, May 1987

JEROME F. GOLDBERG *et al.*,
Appellees,

v.

J. THOMAS JOHNSON, Director of Revenue, *et al.*,
(J. Thomas Johnson, Appellant).

[July 27, 1987]

PER CURIAM: Plaintiffs, Jerome F. Goldberg and Robert McTigue, filed a class action complaint in the circuit court of Cook County against defendant J. Thomas Johnson, Director of the Department of Revenue for the State of Illinois (hereinafter, the Director), and various long-distance telephone carriers, seeking a declaration that section 4 of the Telecommunications Excise Tax Act (hereinafter, section 4) (Ill. Rev. Stat. 1985, ch. 120, par. 2004) is unconstitutional. The complaint further requested an injunction against continued collection of the tax, an accounting and a refund of all taxes already collected. One of the defendant long-distance carriers, GTE Sprint Communications Corporation (GTE), answered and filed a counterclaim against the Director and James H. Donnewald, then Treasurer of the State of Illinois (hereinafter, the Treasurer). GTE's counterclaim sought a preliminary injunction, under section 172 of the State

Officers and Employees Money Disposition Act (Money Disposition Act) (Ill. Rev. Stat. 1985, ch. 127, par. 172), ordering that all monies paid under protest pursuant to section 4 be retained in a protest fund until disposition of plaintiffs' action. In addition, GTE sought a declaration that section 4 is unconstitutional under the commerce clause of the United States Constitution (U.S. Const., art. I, sec. 8). Defendant MCI Telecommunications Corporation (MCI), joined by defendants Republic Telecom Corporation (Republic) and U.S. Telecom Communications Services Company, also moved for a preliminary injunction under the Money Disposition Act. In addition, MCI filed its counterclaim seeking a declaration that section 4 is invalid under the commerce clause. Defendants Satellite Business Systems (SBS) and American Telephone and Telegraph Company (AT&T) also filed motions for a preliminary injunction and for a declaration finding section 4 unconstitutional. The court granted the motions for a preliminary injunction as provided by the Money Disposition Act. The other long-distance carriers named as defendants, Allnet Communications Services, Inc., Electronic Office Centers of America, Inc., Lexitel Corporation, Illinois Bell Telephone Company, International Telephone and Telegraph Corporation, TDX Systems, Inc., TMC Long Distance, and Western Union, did not file motions pursuant to the Money Disposition Act.

Plaintiffs then filed their emergency motion for a preliminary injunction and creation of a special escrow fund or, in the alternative, for an order that payments be made under protest. The court granted the motion and directed that all long-distance telecommunications carriers remit all monies collected pursuant to section 4 and ordered the Director and Treasurer to preserve these monies in a segregated protest fund until final disposition of plaintiffs' suit.

Plaintiffs also filed their motion for class certification as provided by section 2-801 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-801). The court denied this motion. In denying the motion, the court found that a class action was not necessary because all monies in dispute were segregated in a protest fund under the court's jurisdiction and control and, therefore, available for distribution to taxpayers in the event section 4 should be declared unconstitutional. The court also expressed doubts as to the adequacy of the named plaintiffs as representatives of the class.

The Director then filed a motion for summary judgment against defendants and counterplaintiffs GTE, MCI, and SBS on the ground that section 4 was constitutional. GTE responded with its cross-motion for partial summary judgment against the Director while plaintiffs filed their cross-motion for summary judgment against all defendants. Both cross-motions were directed at the constitutionality of section 4. After briefing as well as a hearing, the court declared section 4 unconstitutional.

The court found that the taxable event under section 4 was an interstate telephone call and that "it is the phone call which is taxed and not the sale or purchase of that call." The court concluded that the tax violates the equal protection clause in that "[t]he Act does not treat all Illinois residents the same because it taxes only those who pay for the call and not those whose calls are paid for by others." The court also concluded that the tax violates the commerce clause because the "tax by its own terms is not fairly apportioned[;] [i]t discriminates against interstate commerce and it is not fairly related to services provided in Illinois."

The court granted plaintiffs' motion for summary judgment and GTE's motion for partial summary judgment. The court then entered its order that there was

no just reason to delay an appeal (107 Ill. 2d R. 304(a)) and stayed its judgment, declaring section 4 unconstitutional, pending appeal. The court also allowed its prior order to stand that all monies collected pursuant to section 4 be paid under protest and maintained in a protest fund until exhaustion of appeals. Finally, the court denied plaintiffs' renewed motion for class certification. In doing so, the court changed its original position as to the adequacy of the plaintiffs as representatives of the proposed class but adhered to its prior view that class action status was neither appropriate nor necessary to the efficient resolution of the issues.

The cause comes before this court on the appeal of the Director pursuant to Supreme Court Rule 302(a) (107 Ill. 2d R. 302(a)) to consider the constitutionality of section 4 under the commerce clause and the equal protection clause. For reasons later discussed, we find it unnecessary to address the merits of plaintiffs' cross-appeal on the denial of their motions for class certification.

We also accepted two *amicus curiae* briefs. The National Taxpayers Union filed a brief on behalf of the plaintiffs. The Illinois Municipal League filed a brief on behalf of the Director.

The Director initially attacks the court's characterization of section 4. He contends that the court erred in finding that section 4 taxes the interstate telecommunication itself. According to the Director, the interstate telecommunications tax is a retail tax on the purchase of an interstate telecommunication either originating in or received in Illinois. However, under either characterization of the tax, the Director argues that the tax is valid under the four-part test set forth by the Supreme Court in *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 287, 51 L. Ed. 2d 326, 336, 97 S. Ct. 1076, 1083.

Plaintiffs and defendant GTE contend that the circuit court accurately found that the interstate telecommunications tax is a tax directly on telecommunications originating or received in Illinois. Agreeing that *Complete Auto* establishes the proper test, they argue that the tax violates the commerce clause because, as the circuit court concluded, it is not fairly apportioned, it discriminates against interstate commerce, and it is not fairly related to services provided by Illinois. Under *Complete Auto*, a tax which bears on interstate commerce is valid if: (1) there is a substantial nexus between the activity taxed and the taxing State; (2) it is fairly apportioned so that it is limited to that portion of the interstate activity occurring within the taxing State; (3) it does not discriminate against interstate commerce; and (4) it is fairly related to services provided by the taxing State. 430 U.S. 274, 287, 51 L. Ed. 2d 326, 336, 97 S. Ct. 1076, 1083.

Section 4, in part, provides that "[a] tax is imposed upon the *act or privilege of originating or receiving interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person.*" (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 120, par. 2004.) Under this provision, the taxable event is the "act or privilege of originating or receiving interstate telecommunications by a person in this state" while the amount of the tax is determined by applying a 5% multiplier to the retail purchase price, defined as the "gross charge for such telecommunications" as charged to the retail purchaser in Illinois. Relying on this statutory language, the Director has applied various designations to the tax in issue. For example, the tax has been denominated as a "purchase tax," "a use tax, i.e. use of [a] privilege," "a tax on the privilege or act of using telecommunications within this State," "a consumption tax," and a tax on the "act, or * * * privilege

of consuming messages." However, for purposes of ascertaining whether or not commerce clause analysis applies, it is the taxable event and its practical consequences which are critical rather than the name of the tax or the manner which the tax is measured. (*American Trucking Associations, Inc. v. Scheiner* (U.S. June 23, 1987), 55 U.S.L.W. 4988, and *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, 615-17, 69 L. Ed. 2d 884, 893-94, 101 S. Ct. 2946, 2952-53, both quoting *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331, 97 S. Ct. 1076, 1079.) Thus, the fact that section 4 establishes the purchase price of an interstate telecommunication as the basis upon which the tax is calculated does not transform the taxable event into a retail purchase which, by definition, is local, apportioned, nondiscriminatory, and fairly related to services provided by Illinois as required by *Complete Auto*. Since the taxable event in this case is the "act or privilege of originating or receiving interstate telecommunications * * * in this State," it is clear that the taxable event is linked inextricably to interstate activity—interstate communication. A person simply cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions culminating in interstate communication. We believe that such interstate communication is interstate commerce. The very process of interstate telecommunication is interstate commerce. (*Western Union Telegraph Co. v. Texas* (1882), 105 U.S. 460, 26 L. Ed. 1067; *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1878), 96 U.S. 1, 24 L. Ed. 708.) Moreover, it cannot be doubted that the interstate telecommunications here at issue are involved directly and indirectly in the conduct of interstate commerce. (*Cooney v. Mountain States Telephone & Telegraph Co.* (1935), 294 U.S. 384, 391-92, 79 L. Ed. 934, 940-41, 55 S. Ct. 477, 481.) It is clear, therefore, that the interstate telecommunications tax must be scrutinized under prevailing commerce clause holdings.

We agree with the parties that the four-part test enunciated by the Supreme Court in *Complete Auto* controls our decision on the commerce clause issue. (*Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 287, 51 L. Ed. 2d 326, 336, 97 S. Ct. 1076, 1083; see also *Wardair Canada, Inc. v. Florida Department of Revenue* (1986), 477 U.S. ——, ——, 91 L. Ed. 2d 1, 10, 106 S. Ct. 2369, 2373; *Japan Line, Ltd. v. County of Los Angeles* (1979), 441 U.S. 434, 444-45, 60 L. Ed. 2d 336, 345, 99 S. Ct. 1813, 1819; *Department of Revenue v. Association of Stevedoring Cos.* (1978), 435 U.S. 734, 750, 55 L. Ed. 2d 682, 697, 98 S. Ct. 1388, 1399.) We turn therefore to an analysis of the interstate telecommunications tax under the *Complete Auto* test.

Neither party disputes that Illinois has a sufficient connection both to the taxable event and the service location to satisfy the first element of *Complete Auto*. The tax, by its terms, applies only to interstate telecommunications originating or received in Illinois and paid for in Illinois or billed to a service address in Illinois. Not only does the taxable event transpire in Illinois but the "gross charge" for the taxable event must be paid for in Illinois or billed to an address in Illinois. Consequently, Illinois is exacting a tax only on those interstate communications which touch the State and which are actually paid for in Illinois or are billed to service addresses located in Illinois. We have no doubt that these connections satisfy the nexus requirement of *Complete Auto*.

The second element of the *Complete Auto* test is fair apportionment of the tax to that portion of the taxable event occurring within the taxing State. Since the instant tax applies to the entirety of each and every interstate telecommunication, it is not an apportioned tax. An unapportioned tax, however, is not necessarily invalid. (*Wisconsin Telephone Co. v. Wisconsin Department of Revenue* (1985), 125 Wis. 2d 339, 347, 371 N.W. 2d 825,

830.) Such a tax, of course, is constitutionally suspect because of the risk of multiple taxation. Indeed, the requirement of apportionment is significant principally because it helps to insure that the tax will not discriminate against interstate commerce by subjecting it to actual or potential multiple taxation. (*Container Corp. of America v. Franchise Tax Board* (1983), 463 U.S. 159, 170-71, 77 L. Ed. 2d 545, 557, 103 S. Ct. 2933, 2943; *Japan Line, Ltd. v. County of Los Angeles* (1979), 441 U.S. 434, 446-47, 60 L. Ed. 2d 336, 347, 99 S. Ct. 1813, 1820.) Therefore, the fact that the instant tax is unapportioned does not mean that it is necessarily unconstitutional under the commerce clause. If the tax avoids the pitfall of multiple taxation, or the risk of such taxation, it is nondiscriminatory; and, the fact that it is unapportioned is not constitutionally significant. In this regard, we note that the tax does not discriminate in favor of intrastate telecommunications since section 3 of the Telecommunications Excise Tax Act imposes the same 5% levy "upon the act or privilege of originating in this State or receiving intrastate telecommunications by a person in this State." Ill. Rev. Stat. 1985, ch. 120, par. 2003.

The interstate telecommunications tax applies under either of two circumstances: (1) the origination, in Illinois, of an interstate telecommunication which is paid for in Illinois or billed to a service address located in Illinois or (2) the reception, in Illinois, of an interstate telecommunication which is billed to a service address in Illinois. With respect to the origination of an interstate telecommunication in Illinois, it appears that, even though unapportioned, no other taxing entity could levy a tax on this taxable event. (*Wisconsin Telephone Co. v. Wisconsin Department of Revenue* (1985), 125 Wis. 2d 339, 348, 371 N.W.2d 825, 830-31; *Douglas v. Glacier State Telephone Co.* (Alaska 1980), 615 P.2d 580, 588.) Where no other taxing body can levy the tax being challenged, it

is clear that there is no risk of multiple taxation and, consequently, no discrimination against interstate commerce. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue* (U.S. June 23, 1987), 55 U.S.L.W. 4978; *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 644, 81 L. Ed. 2d 540, 546, 104 S. Ct. 2620, 2623.

The situation is somewhat different with respect to the tax levied on the reception, in Illinois, of an interstate telecommunication which is billed to a service address located in Illinois. This tax appears to pose a risk of multiple taxation. Thus, this portion of the tax must be reviewed carefully to insure that it does not discriminate against interstate commerce.

Illustrating that there is a real risk of multiple taxation, the record reveals that at least two taxing jurisdictions levy a tax similar to the instant tax insofar as it pertains to the reception of interstate telecommunications in Illinois. The municipality of Wheat Ridge, Colorado, imposes a sales tax "[u]pon telecommunications services * * * for all interstate and intrastate telecommunications service originating from or received on telecommunications equipment in this city if the charge for the service is billed to a person in this city or billed to an affiliate or division of such person in any state/city on behalf of a person in this city." (Wheat Ridge, Colo., ordinance No. 630, sec. 21-4(b).) The municipality of Greeley, Colorado, imposes the identical tax. (Greeley, Colo., ordinance No. 45, sec. 1.) In comparison, as stated earlier, section 4 levies a tax on all interstate telecommunications received in Illinois and billed to a service address in Illinois. Reading these two provisions together, a collect interstate telecommunication sent from a business office in Wheat Ridge or Greeley, Colorado, to an affiliated office anywhere in Illinois would be taxed twice. Clearly, this is multiple taxation of the same interstate taxable event which would be prohibited by the commerce clause, as interpreted by *Complete Auto* and its progeny,

except for the fact that section 4 provides a credit against any tax due from a taxpayer who has paid two or more taxes on the same interstate telecommunication. (Ill. Rev. Stat. 1985, ch. 120, par. 2004.) We believe that this provision cures any possible constitutional infirmity resulting from multiple taxation. (*Tyler Pipe Industries, Inc. v. Washington Department of Revenue* (U.S. June 23, 1987), 55 U.S.L.W. 4978, 4982 & n.13; see *Henneford v. Silas Mason Co.* (1937), 330 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 535.) Consequently, the tax imposed upon the reception in Illinois of interstate telecommunications does not discriminate against interstate commerce. Thus, the third prong of *Complete Auto* is satisfied. It remains to determine whether or not the telecommunications tax is valid under the fourth prong of *Complete Auto*, which requires that the tax be "fairly related to benefits provided the taxpayer."

The State in taxing the origination in Illinois of interstate telecommunications is taxing an event which is facilitated by services it provides both to the taxpayer and the interstate telecommunications carriers. Indeed, the services provided by the State facilitate perhaps the most critical step in the taxable event—interstate origination.

It is true that the State is taxing the "gross charge" of the entire interstate telecommunication even though the benefits it affords are limited to that portion of the communication occurring within the State. However, we believe that the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits extended by Illinois. (*Cf. Western Live Stock v. Bureau of Revenue* (1938), 303 U.S. 250, 259-60, 82 L. Ed. 823, 830, 58 S. Ct. 546, 550-51.) We believe that the instant tax is "fairly related to benefits provided the taxpayer" and, therefore, meets the fourth requirement of the *Complete Auto* test. *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, 625-29, 69 L. Ed. 2d 884, 899-902, 101 S. Ct. 2946, 2957-59.

We have scrutinized the interstate telecommunications tax under the test enunciated in *Complete Auto* and conclude that it is not an impermissible tax on interstate commerce. We hold that the tax is valid under the commerce clause. We turn now to a consideration of whether or not the tax levied on interstate telecommunications is constitutional under the equal protection clause of the Illinois and United States Constitutions.

It is well settled that a legislature has great latitude in determining the taxes it will impose. (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 359, 364, 35 L. Ed. 2d 351, 354-55, 357, 93 S. Ct. 1001, 1003-04, 1006; *Hoffmann v. Clark* (1977), 69 Ill. 2d 402, 425; *Jacobs v. City of Chicago* (1973), 53 Ill. 2d 421, 425.) Further, it is well settled that a tax will be upheld, for purposes of equal protection, if there is any set of circumstances under which the legislative classification is, in fact, a rational exercise of the State's authority to tax. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 364, 35 L. Ed. 2d 351, 358, 93 S. Ct. 1001, 1006; *Hoffmann v. Clark* (1977), 69 Ill. 2d 402, 425; *Jacobs v. City of Chicago* (1973), 53 Ill. 2d 421, 425.

Plaintiffs contend that it is arbitrary and irrational to exempt from taxation those interstate telecommunications originating in Illinois but paid for in other States, such as collect telephone calls, or those telecommunications billed to service addresses located in other States, such as credit-card telephone calls. In plaintiffs' view, persons originating such interstate telecommunications are situated no differently than persons originating interstate telecommunications in Illinois but who pay directly, as in a coin-operated telephone call, or who have the telecommunication billed to an Illinois service address. Since all persons in Illinois who originate interstate telecommunications are engaging in precisely the same activity, the plaintiffs conclude that the differential

treatment of these two categories can have no rational basis and is manifestly arbitrary and capricious.

We disagree. In our view, there is a rational basis supporting imposition of the interstate telecommunications tax particularly insofar as the tax applies to those interstate telecommunications originating in Illinois and either paid for directly in Illinois or billed to a service address located in Illinois.

We note that those persons who originate interstate telecommunications in Illinois for which they neither pay nor are billed in Illinois are usually nonresidents of the State. Being nonresidents, their ties to the State and any benefits which they may derive from being in the State are minimal. On the other hand, the ties to the State and benefits derived from the State which exist in the case of persons who originate telecommunications paid for or billed in Illinois are substantial. For this reason, we believe that the legislature could rationally decide to treat the interstate telecommunications neither paid for nor billed in Illinois differently, even if more favorably, than those interstate telecommunications which are paid for or billed in Illinois. The fact that a nonresident originating a noncollect interstate telecommunication from a coin-operated telephone pays the tax does not alter our analysis. Similarly, the distinction between the reception, in Illinois, of interstate telecommunications billed to service addresses in Illinois, on the one hand, and the reception of such telecommunications billed to non-Illinois service addresses, on the other, is rational because there is little or no basis for the State to tax nonresidents whose telecommunications originate outside of Illinois and are paid for or billed outside of Illinois. There is no substantial nexus between the State and these persons and no substantial nexus between the State and the place of payment or billing. Moreover, the State provides few, if any, services to nonresidents whose telecommunications are received in Illinois but

neither paid for nor billed here. We conclude that the interstate telecommunications tax is constitutional under the equal protection clause of both the Illinois and United States Constitutions.

For the reasons stated herein, we hold that the instant tax is constitutional under the commerce clause and the equal protection clause and we reverse the judgment of circuit court of Cook County declaring the tax unconstitutional. Because of our disposition of the constitutional issues, plaintiffs' cross-appeal of the court's orders denying motions for class certification is now moot and we vacate those orders. *George W. Kennedy Construction Co. v. City of Chicago* (1986), 112 Ill. 2d 70, 78; *First National Bank v. Kusper* (1983), 98 Ill. 2d 226, 236.

Judgment reversed;
orders vacated.

CLARK, C.J., and GOLDENHERSH and SIMON, JJ., took no part in the consideration or decision of this case.

APPENDIX D

IN THE SUPREME COURT OF ILLINOIS

No. 64355

JEROME F. GOLDBERG, *et al.*, ETC.,
Appellees

v.

J. THOMAS JOHNSON, Director of Revenue, ETC., *et al.*,
Appellants

Appeal Circuit Court Cook County
85 CH 8081

Submitted May 28, 1987
Agenda 30

ORDER

[Filed June 24, 1987]

The Court having considered the record, briefs, and arguments of the parties and *amici curiae* in this cause,

It is the judgment of this Court that the Illinois Telecommunications Excise Tax Act (Ill. Rev. Stat. 1986 Supp., ch. 120, par. 2001 *et seq.*) is constitutional and the judgment of the Circuit Court of Cook County finding the statute unconstitutional is therefore reversed.

Chief Justice Clark, Justice Goldenhersh and Justice Simon took no part in the consideration or decision of this case.

This announcement is made at this time because of the public importance of this revenue litigation. An opinion setting forth the reasons for the Court's judgment will be completed and filed at a later date.

APPENDIX E

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 85 CH 8081

Judge Richard L. Curry

JEROME F. GOLDBERG and ROBERT MCTIGUE, Individually and on behalf of all others similarly situated,
Plaintiffs,

v.

J. THOMAS JOHNSON, *et al.*,
Defendants.

ORDER

Before the Court are various parties' cross motions for summary judgment. The Court has carefully considered the parties memoranda and other filings in connection therewith and has held extensive oral argument. Being now fully advised in the premises,

IT IS HEREBY ORDERED as follows:

1. For the reasons stated by the Court in open court (and recorded in the portion of the Transcript of Proceedings thereof attached hereto), "Plaintiffs' Motion for Summary Judgment" and the "Motion of Defendant and Counterclaimant GTE Sprint Communications Corporation for Partial Summary Judgment" are hereby GRANTED, and the "Motion Of Defendant/Counterdefendants, J. Thomas Johnson, Director of Revenue, and James H. Donnewald, Treasurer, For Summary Judgment Against Plaintiffs Goldberg And McTigue And CounterPlaintiff MCI Telecommunications And For Partial Summary Judgment Against Counterplaintiffs GTE

Sprint And SBS Skyline" is hereby DENIED. The Court's findings of fact and conclusions of law are as set forth in the attached excerpts from the Transcript of Proceedings.

2. Plaintiffs' Renewed Motion For Class Certification is denied.

3. By agreement of the parties, the Court shall hold in abeyance any award of attorneys' fees or expense reimbursement pending the outcome of appeals in this case.

4. The Motion of Defendants Johnson And Donnewald To Stay Effectiveness Of Order Pending Appeal is hereby granted. The Court's ruling as to unconstitutionality reflected in paragraph 1 hereof is stayed pending appeal, as a result of which stay the defendants shall continue to collect and deal with the tax (and the monies therefrom) in accordance with the prior orders of this Court.

5. The Motion For Declaration Of Rights by Defendant Illinois Bell Telephone Company is granted. The Court declares that Section 21 of the Telecommunications Excise Tax Act shall not be effective until all state and federal proceedings and appeals shall have been exhausted; in the event that the Court's rulings in paragraph 1 hereof shall ultimately be affirmed, the effective date of Section 21 shall be the date upon which this Court receives the final mandate in this case, and Section 21 shall apply prospectively from that date.

6. The Agreed Motion For Specific Finding by Defendant J. Thomas Johnson and by Plaintiffs Jerome Goldberg and Robert McTigue is hereby granted.

IT IS THE SPECIFIC FINDING of this Court that there is no just reason to delay appeal from this Order.

ENTERED:

JUDGE: /s/ Richard L. Curry
RICHARD L. CURRY

DATE: October 21, 1986.

[EXCERPTS FROM THE TRANSCRIPT
OF PROCEEDINGS]

* * * *

[65] THE COURT: Thank you, counsel.

As I indicated when we commenced, I have had the opportunity to review the motions for summary judgment, motion for part summary judgment, the briefs in support and the briefs in opposition, and now the excellent quality of the briefs has been carried forward to the fine quality of the [66] oral arguments and I thank you for it.

This matter is here on summary judgment. Each side has recognized that the case is ripe for determination as a matter of law and it will be so decided on that basis. A Tax Act must be interpreted by giving meaning to the actual words used in the Act and the interpretation must be compatible with the intention expressed by the words employed.

Here the Act reads in Section 4:

> "A tax is imposed upon the act or privilege of originating or receiving interstate telecommunications by a person in the state."

Those words unmistakably mean that the taxable transaction is the interstate phone call. In an attempt to obviate the apparent commerce clause difficulties which such a tax encounters, the drafter or the draftsman of the statute goes further and attempts to localize the event in Illinois by adding situs language to the effect "for such telecommunications purchased at retail."

The incident of payment to my view, really adds nothing to the taxable event. That [67] event is across state lines and necessarily involves a party out of state. The fact that the out of state party has not or will not pay for the call is irrelevant to the interstate realities of the event.

Notwithstanding the state's valiant efforts both in drafting the legislation and in presenting their position here in briefs and in oral arguments, it is the phone call which is taxed and not the sale or purchase of that call.

Five percent of the gross charge makes it clear that the call itself and not its billing in Illinois is what is really being taxed and that event is an interstate activity.

In an attempt to tax some local aspect of an interstate phone call, the state asks the Court to focus on one-half of what goes on during that event, that is, the originating or receipt of a phone call to or from out of state, and then the state seeks to combine that half of a transaction with the billing of the same so as to make the entire transaction an Illinois transaction.

The bill, of course, reflects the [68] other out-of-state half of the transaction and in taxing five percent of the entire bill it's apparent that the state is taxing activities which take place outside of Illinois.

The Act does not treat all Illinois residents the same because it taxes only those who pay for the call and not those whose calls are paid for by others. As such, the Act as written and as interpreted here in these briefs violates the equal protection clause.

To my view it strains both common knowledge and common sense to characterize an interstate phone call in terms of an Illinois sale at retail and thereby ignore the realities of its interstate participant and the interstate communication system over which it has taken place. Such a strained effort results in attributing significance to an incidental event while ignoring the essence of the event itself.

The relevant inquiry is as to just what is being taxed and not who is being taxed and when that inquiry is made as to these calls, it's apparent that what is being taxed is the interstate phone call.

[69] The billing or the payment for a service is an indication that the taxable transmission or taxable transaction proceeded. The interstate significance in what has preceded the billing under this Act is so apparent that it may not be denied or obscured by the fiction that nothing taxable has happend until the billing effort is undertaken or the fiction that all which took place took place in Illinois.

The sending or receiving of an interstate message when taken alone clearly has interstate significance and a tax on such would need be apportioned. Does the added factor of an Illinois payment negate the interstate aspect and cause a transaction then to become a local event for which no apportionment is required? I really think not. The payment is a mere incident of the underlying transaction and cannot serve to make local that which is unmistakenly interstate.

The Illinois Act violates the commerce clause of the Constitution because the interstate phone call, which is the event being taxed, could quite possibly and reasonably be an event of taxation at the other end of the phone [70] call as well.

This possibility of multiple taxation causes the Act in question here to run afoul of the commerce clause. The Act unduly burdens interstate commerce because it's not fairly related to services provided in Illinois. The Act taxes the entire cost of the interstate call as billed in Illinois and thereby it recognizes that this two party event is taking place in two places and one of those two places is not Illinois.

The Illinois Telecommunication Excise Tax Act fails to meet at least three of the four criteria set out in the Supreme Court decision of Complete Auto versus Brady, 430 U.S. 274. The state calls this tax by various names throughout its brief. First it's called a consumption tax. Then it's called essentially a use tax. Then it's called a

gross charge tax and so on and so forth throughout the brief until today it's called a tax on purchase. The title of the Act calls it an excise tax.

The state is not sure what it is, but it's sure that it is not a gross receipts tax. Of course, it cannot be a gross reecipts tax or else [71] its unconstitutionality is preordained by the same fate that terminated its predecessor, the Illinois Messages Tax Act.

In Reif versus Barrett, 355 Il. 104, page 109 and 110, the Illinois Supreme Court noted that "the type of tax is not changed by any names that may be given it under the law through which it was enacted."

In Commercial National Bank versus City of Chicago, 89 Il. 2nd., page 45, the Supreme Court found the city service tax to be actually a tax on occupations, notwithstanding the fact that the legal incident for the tax was placed on the service user and not on the service provider. Here the state similarly argues that the tax is on the consumer and not on the carrier.

In Commercial National Bank, the Court stated at page 66:

> "There is essentially no difference between the service tax and an occupation tax measured by gross receipts."

The Court then looked right through the transparent draftsmanship and found that the [72] essence of the tax was controlling and the Court stated:

> "Obviously the drafters attempted to tailor the ordinance to incorporate a sufficient amount of such language, that is, magic words, to transform an occupation tax into a tax upon the purchaser."

Here, also, the new tax is merely an attempt to dress up the old gross receipt tax on interstate phone calls, put that old tax in a new dress so that it may be able

to get around the Supreme Court decision in Illinois Bell versus Offen, 93 Il.2nd., page 241.

Illinois is attempting to tax the entire cost of an interstate act which takes place only partially in Illinois. This tax by its own terms is not fairly apportioned. It discriminates against interstate commerce and it is not related to services provided in Illinois. For all of these reasons the Act must fail.

Because the Act fails, the plaintiffs' motion for summary judgment is granted and the defendants' motion for summary judgment is [73] denied. The counterplaintiffs' motion for part summary judgment is granted.

That will be the order. Thank you very much. The record shall reflect that these comments shall stand as my findings of facts and conclusions of law, and any order that's presented should make reference to the fact that they are made and are available in the recorded transcription of today's events. Thank you, counsel.

MR. JACOBS: Thank you, your Honor.

(Which were all the proceedings had at the time and place specified.)

APPENDIX F

TELECOMMUNICATIONS EXCISE TAX ACT

P.A. 84-126, Art. VI, Ill. Rev. Stat. ch. 120, ¶¶ 2001-21.

2001. Short title

§ 1. This Article shall be known and may be cited as the "Telecommunications Excise Tax Act". The net proceeds from the taxes imposed by this Act shall be used for the support of the General Revenue Fund and education.

P.A. 84-126, Art. VI, § 1, eff. Aug. 1, 1985.

2002. Definitions

§ 2. As used in this Article, unless the context requires otherwise:

(a) "Gross charge" means the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer, valued in money whether paid in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of such telecommunications, the cost of materials used, labor or service costs or any other expense whatsoever. In case credit is extended, the amount thereof shall be included only as and when paid. However, "gross charges" shall not include:

(1) any amounts added to a purchaser's bill because of a charge made pursuant to (i) the tax imposed by this Article; (ii) charges added to customers' bills pursuant to the provisions of paragraph (a) or (b) of Section 36 of "An Act concerning public utilities", approved June 29, 1921, as amended,[1] or any similar charges added to customers' bills by retailers who are not subject to rate regulation by the Illinois Commerce Commission for

[1] Chapter 24, ¶ 8-11-1; ch. 34, ¶ 409.01.

the purpose of recovering any of the tax liabilities or other amounts specified in such paragraphs (a) and (b) of such Act; or (iii) the tax imposed by Section 4251 of the Internal Revenue Code; [2]

(2) charges for a sent collect telecommunication received outside of the State;

(3) charges for leased time on equipment or charges for the storage of data or information for subsequent retrieval or the processing of data or information intended to change its form or content. Such equipment includes, but is not limited to, the use of calculators, computers, data processing equipment, tabulating equipment or accounting equipment and also includes the usage of computers under a time-sharing agreement.

(4) Charges for customer equipment, including such equipment that is leased or rented by the customer from any source, wherein such charges are disaggregated and separately identified from other charges.

(b) "Amount paid" means the amount charged to the taxpayer's service address in this State regardless of where such amount is billed or paid.

(c) "Telecommunications", in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter, computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. The definition of

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[2] 26 U.S.C.A. § 4251.

"telecommunications" shall not include value added services in which computer processing applications are used to act on the form, content, code and protocol of the information for purposes other than transmission. "Telecommunications" shall not include purchases of telecommunications by a telecommunications service provider for use as a component part of the service provided by him to the ultimate retail consumer who originates or terminates the taxable end-to-end communications. Carrier access charges, right of access charges, charges for use of inter-company facilities, and all telecommunications resold in the subsequent provision of, used as a component of, or integrated into end-to-end telecommunications services shall be non-taxable as sales for resale.

(d) "Interstate telecommunications" means all telecommunications that either originate or terminate outside this State.

(e) "Intrastate telecommunications" means all telecommunications that originate and terminate within this State.

(f) "Department" means the Department of Revenue of the State of Illinois.

(g) "Director" means the Director of Revenue for the Department of Revenue of the State of Illinois.

(h) "Taxpayer" means a person who individually or through his agents, employees or permittees engages in the act or privilege of originating or receiving telecommunications in this State and who incurs a tax liability under this Article.

(i) "Person" means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint venture, corporation or a receiver, trustee, guardian or other representative appointed by order of any court, the Federal and State governments, including State univer-

sities created by statute or any city, town, county or other political subdivision of this State.

(j) "Purchase at retail" means the acquisition, consumption or use of telecommunication through a sale at retail.

(k) "Sale at retail" means the transmitting, supplying or furnishing of telecommunications and all services and equipment provided in connection therewith for a consideration to persons other than the Federal and State governments, and State universities created by statute and other than between a parent corporation and its wholly owned subsidiaries or between wholly owned subsidiaries, when the tax has already been paid to a retailer and the gross charge made by one such corporation to another such corporation is not greater than the gross charge paid to the retailer for their use or consumption and not for resale.

(l) "Retailer" means and includes every person engaged in the business of making sales at retail as defined in this Article. The Department may, in its discretion, upon application, authorize the collection of the tax hereby imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized it shall be the duty of such retailer to collect the tax upon all of the gross charges for telecommunications in this State in the same manner and subject to the same requirements as a retailer maintaining a place of business within this State. The permit may be revoked by the Department at its discretion.

(m) "Retailer" maintaining a place of business in this State", or any like term, means and includes any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution facilities, transmission

facilities, sales office, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.

P.A. 84-126, Art. VI, § 2, eff. Aug. 1, 1985. Amended by P.A. 84-1099, § 2, eff. Dec. 9, 1985.

2003. Imposition of tax—intrastate telecommunications—Exemptions

§ 3. A tax is imposed upon the act or privilege of originating or receiving intrastate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person. However, such tax is not imposed on the act or privilege to the extent such act or privilege may not, under the Constitution and statutes of the United States, be made the subject of taxation by the State.

P.A. 84-126, Art. VI, § 3, eff. Aug. 1, 1985. Amended by P.A. 84-1099, § 2, eff. Dec. 9, 1985. Amended by P.A. 84-1295, § 3, eff. Aug. 19, 1986.

2004. Imposition of tax—Interstate telecommunications—Credit—Exemptions

§ 4. A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person. To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, upon proof that that taxpayer has paid a tax in another state on such event, shall be allowed a credit against the tax imposed in this Section 4 to the extent of

the amount of such tax properly due and paid in such other state. However, such tax is not imposed on the act or privilege to the extent such act or privilege may not, under the Constitution and statutes of the United States, be made the subject of taxation by the State.

P.A. 84-126, Art. VI, § 4, eff. Aug. 1, 1985. Amended by P.A. 84-1295, § 4, eff. Aug. 19, 1986.

2005. Collection of tax

§ 5. The tax imposed hereunder shall be collected from the taxpayer by a retailer maintaining a place of business in this State and remitted to the Department pursuant to Section 5 hereof. The tax required to be collected by this Article and any such tax collected by such retailer shall constitute a debt owed by the retailer to this State. Retailers shall collect the tax from the taxpayer by adding the tax to the gross charge for the act or privilege of originating or receiving telecommunications in this State, when sold for use, in the manner prescribed by the Department. Whenever possible, the tax imposed by this Article shall, when collected, be stated as a distinct item separate and apart from the gross charge for telecommunications. In the case of coin-operated telecommunication devices, the tax collections may be combined with the charge for service. If the tax imposed by this Article is paid by inserting coins in coin-operated telecommunications devices, the tax shall be computed each time coins are inserted in the coin-operated telecommunications device to the nearest multiple of 5 cents except that where the tax is midway between multiples of 5 cents, the next higher multiple shall apply. The tax imposed by this Article shall constitute a debt of the purchaser to the retailer who provides such taxable services until paid, and, if unpaid, is recoverable at law in the same manner as the original charge for such taxable services.

P.A. 84-126, Art. VI, § 5, eff. Aug. 1, 1985. Amended by P.A. 84-1009, § 2, eff. Dec. 9, 1985.

2006. Tax returns by retailers—Estimated payments—Extensions

§ 6. Except as provided hereinafter in this Section, on or before the 15th day of each month each retailer maintaining a place of business in this State shall make a return to the Department for the preceding calendar month, stating:

1. His name;
2. The address of his principal place of business, and the address of the principal place of business (if that is a different address) from which he engages in the business of transmitting telecommunications;
3. Total amount of gross charges billed by him during the preceding calendar month for providing telecommunications during such calendar month;
4. Total amount received by him during the preceding calendar month on credit extended;
5. Deductions allowed by law;
6. Gross charges which were billed by him during the preceding calendar month and upon the basis of which the tax is imposed;
7. Amount of tax (computed upon Item 6);
8. Such other reasonable information as the Department may require.

If the retailer's average monthly tax billings due to the Department do not extend $100, the Department may authorize his returns to be filed on a quarter annual basis, with the return for January, February and March of a given year being due by April 15 of such year; with the return for April, May and June of a given year being due by July 15 of such year; with the return for July, August and September of a given year being due by October 15 of such year; and with the return of October,

November and December of a given year being due by January 15 of the following year.

Notwithstanding any other provision of this Article containing the time within which a retailer may file his return, in the case of any retailer who ceases to engage in a kind of business which makes him responsible for filing returns under this Article, such retailer shall file a final return under this Article with the Department not more than one month after discontinuing such business.

In making such return, the retailer shall determine the value of any consideration other than money received by him and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the manner hereinafter provided for the correction of returns.

Each retailer whose average monthly liability to the Department under this Article was $10,000 or more during the preceding calendar year, excluding the month of the highest liability and the month of lowest liability in such calendar year, and who is not operated by a unit of local government, shall make estimated payments to the Department on or before the 7th, 15th, 22nd and last day of the month during which tax collection liability to the Department is incurred in an amount not less than the lowest of either 22.5% of the retailer's actual tax collections for the month or 25% of the retailer's actual tax collections for the same calendar month of the preceding year. The amount of such quarter monthly payments shall be credited against the final liability of the retailer's return for that month. Any outstanding credit, approved by the Department, arising from the retailer's overpayment of its final liability for any month may be applied to reduce the amount of any subsequent quarter monthly payment or credited against the final liability of the retailer's return for any subsequent month. If any quarter monthly payment is not paid at the time or in the amount

required by this Section, the retailer shall be liable for penalty and interest on the difference between the minimum amount due as a payment and the amount of such payment actually and timely paid, except insofar as the retailer has previously made payments for that month to the Department in excess of the minimum payments previously due.

If the Director finds that the information required for the making of an accurate return cannot reasonably be compiled by a retailer within 15 days after the close of the calendar month for which a return is to be made, he may grant an extension of time for filing of such return for a period of not to exceed 31 calendar days. The granting of such an extension may be conditioned upon the deposit by the retailer with the Department of an amount of money not exceeding the amount estimated by the Director to be due with the return so extended. All such deposits, including any heretofore made with the Department, shall be credited against the retailer's liabilities under this Article. If any such deposit exceeds the retailer's present and probable future liabilities under this Article, the Department shall issue to the retailer a credit memorandum, which may be assigned by the retailer to a similar retailer under this Article, in accordance with reasonable rules and regulations to be prescribed by the Department.

The retailer making the return herein provided for shall, at the time of making such return, pay to the Department the amount of tax herein imposed. On and after the effective date of this Article of 1985, $1,000,000 of the moneys received by the Department of Revenue pursuant to this Article shall be paid each month into the Common School Fund and the remainder into the General Revenue Fund.

P.A. 84-126, Art. VI, § 6, eff. Aug. 1, 1985.

2007. Tax returns by taxpayer—Direct payments—Receipts

§ 7. When a taxpayer does not pay the tax imposed by this Article to retailer, such taxpayer shall file a return with the Department and pay the tax upon that portion of gross charges so paid to the retailer during the preceding calendar month by the 15th day of the month following that month. Such return shall be filed on a form prescribed by the Department and shall contain such information as the Department may reasonably require.

When a taxpayer pays a tax imposed by this Article directly to the Department, the Department (upon request therefor from such taxpayer) shall issue an appropriate receipt to such taxpayer showing that he has paid such tax to the Department. Such receipt shall be sufficient to relieve the taxpayer from further liability for the amount of tax to which such receipt may refer.

P.A. 84-126, Art. VI, § 7, eff. Aug. 1, 1985.

2008. Resale number

§ 8. If a person who originates or receives telecommunications in this State claims to be a reseller of such telecommunications, such person shall apply to the Department for a resale number. Such applicant shall state facts which will show the Department why such applicant is not liable for tax under this Article on any of his purchases and shall furnish such additional information as the Department may reasonably require.

Upon approval of the application, the Department shall assign a resale number to the applicant and shall certify such number to him. The Department may cancel any such number which is obtained through misrepresentation, or which is used to originate or receive such telecommunications tax-free when such actions in fact are not for

resale, or which no longer applies because of the person's having discontinued the making of resales.

Except as provided hereinabove in this Section, the act or privilege of originating or receiving telecommunications in this State shall not be made tax-free on the ground of being a sale for resale unless the person has an active resale number from the Department and furnishes that number to the retailer in connection with certifying to the retailer that any sale to such person is nontaxable because of being a sale for resale.

P.A. 84-126, Art. VI, § 8, eff. Aug. 1, 1985.

2009. Application of Retailers' Occupation Tax provisions

§ 9. All of the provisions of Sections 4, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j and 13½ of the "Retailers' Occupation Tax Act", as now or hereafter amended [3] which are not inconsistent with this Article, shall apply, as far as practicable, to the subject matter of this Article to the same extent as if such provisions were included herein. References in such incorporated Sections of the "Retailers' Occupation Tax Act" [4] to retailers, to sellers or to persons engaged in the business of selling tangible personal property mean retailers, as defined in this Article, or persons engaged in the act or privilege of originating or receiving telecommunications. References in such incorporated Sections of the "Retailers' Occupation Tax Act" to purchasers of tangible personal property mean purchasers of telecommunications as defined in this Article. References in such incorporated Sections of the "Retailers' Occupation Tax Act" to sales of tangible personal property mean the act or privilege of originating or receiving telecommunications as defined in this Article.

P.A. 84-126, Art. VI, § 9, eff. Aug. 1, 1985.

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[3] Paragraphs 443, 444, 444a, 444b, 444c, 444d, 444e, 444f, 444g, 444h, 444i, 444j, 445½ of this chapter.

[4] Paragraph 440 et seq. of this chapter.

2010. Credits or refunds

§ 10. If it shall appear that an amount of tax or penalty or interest has been paid in error hereunder to the Department by a taxpayer, as distinguished from the retailer, whether such amount be paid through a mistake of fact or an error of law, such taxpayer may file a claim for credit or refund with the Department. If it shall appear that an amount of tax or penalty or interest has been paid in error to the Department hereunder by a retailer who is required or authorized to collect and remit the tax imposed by this Article, whether such amount be paid through a mistake of fact or an error of law, such retailer may file a claim for credit or refund with the Department provided that no credit or refund shall be allowed for any amount paid by any such retailer unless it shall appear that he bore the burden of such amount and did not shift the burden thereof to anyone else or unless it shall appear that he or she or his or her legal representative has unconditionally repaid such amount to his customer (1) who bore the burden thereof and has not shifted such burden directly or indirectly in any manner whatsoever; or (2) who, if he or she shifted such burden, has repaid unconditionally such amount to his or her own customer; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his retailer, nor to be relieved of such burden in any other manner whatsoever.

If it is determined that the Department should issue a credit or refund under this Article, the Department may first apply the amount thereof against any amount of tax or penalty or interest due hereunder from the person entitled to such credit or refund. For this purpose, if proceedings are pending to determine whether or not any tax or penalty or interest is due under this Article from such person, the Department may withhold issuance of the credit or refund pending the final disposition of such proceedings and may apply such credit or re-

fund against any amount found to be due to the Department as a result of such proceedings. The balance, if any, of the credit or refund shall be issued to the person entitled thereto.

If no tax or penalty or interest is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or interest, the credit memorandum or refund shall be issued to the claimant; or (in the case of a credit memorandum) the credit memorandum may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to this Article, and the amount thereof shall be applied by the Department against any tax or penalty or interest due or to become due under this Article from such assignee.

As to any claim for credit or refund filed with the Department on or after each January 1 and July 1, no amounts erroneously paid more than three years prior to such January 1 and July 1, respectively, shall be credited or refunded.

Claims for credit or refund shall be filed upon forms provided by the Department. As soon as practicable after any claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant is entitled and shall notify the claimant of such determination, which amount shall be prima facie correct.

A claim for credit or refund shall be considered to have been filed with the Department on the date upon which it is received by the Department. Upon receipt of any claim for credit or refund filed under this Article, any officer or employee of the Department, authorized in writing by the Director of Revenue to acknowledge receipt of such claims on behalf of the Department, shall execute on behalf of the Department, and shall deliver or mail to the claimant or his duly authorized agent, a written receipt,

acknowledging that the claim has been filed with the Department, describing the claim in sufficient detail to identify it and stating the date upon which the claim was received by the Department. Such written receipt shall be prima facie evidence that the Department received the claim described in such receipt and shall be prima facie evidence of the date when such claim was received by the Department. In the absence of such a written receipt, the records of the Department as to when the claim was received by the Department, or as to whether or not the claim was received at all by the Department, shall be deemed to be prima facie correct upon these questions in the event of any dispute between the claimant (or his or her legal representative) and the Department concerning these questions.

Any credit or refund that is allowed under this Article shall bear interest at the rate of 1% per month or fraction thereof from the date when the erroneous payment for which the credit or refund is being allowed was made to the Department until the credit memorandum is issued or the refund is paid.

In case the Department determines that the claimant is entitled to a refund, such refund shall be made only from such appropriation as may be available for that purpose. If it appears unlikely that the amount appropriated would permit everyone having a claim allowed during the period covered by such appropriation to elect to receive a cash refund, the Department by rule or regulation shall provide for the payment of refunds in hardship cases and shall define what types of cases qualify as hardship cases.

P.A. 84-126, Art. VI, § 10, eff. Aug. 1, 1985.

2011. Books, records, papers and other documents

§ 11. Every retailer maintaining a place of business in this State under this Article and every taxpayer making direct tax payments to the Department under this Article shall keep books, records, papers and other documents

which are adequate to reflect the information required by Sections 6 and 7 of this Article[5] to be reported to the Department by filing timely returns with the Department. All books and records and other papers and documents required by this Article to be kept shall be kept in the American language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.

The Department may, upon written authorization of the Director, destroy any returns or records, papers or memoranda pertaining to such returns upon the expiration of any period covered by such returns with respect to which the Department is authorized to establish liability.

P.A. 84-126, Art. VI, § 11, eff. Aug. 1, 1985.

2012. Investigations and hearings

§ 12. For the purpose of administering and enforcing the provisions of this Article, the Department or any officer or employee of the Department designated, in writing, by the Director thereof, may hold investigations and hearings concerning any matters covered by this Article and may examine any books, papers, records or memoranda bearing upon the business transacted or purchased by any such retailer or taxpayer and may require the attendance of such retailer or taxpayer or any officer or employee of such, or of any person having knowledge of such business, and may take testimony and require proof of its information. In the conduct of any investigation or hearing, neither the Department nor any officer or employee thereof shall be bound by the technical rules of evidence, and no informality in any proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made or approved or confirmed by the Department. The Director or any officer

[5] Paragraphs 2006 and 2007 of this chapter.

or employee thereof shall have power to administer oaths to any such persons. The books, papers, records and memoranda of the Department, or parts thereof, may be provided in any hearing, investigation or legal proceeding by a reproduced copy thereof under the certificate of the Director. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding.

P.A. 84-126, Art. VI, § 12, eff. Aug. 1, 1985.

2013. Testimony in investigations and hearings—Immunity—Perjury

§ 13. No person shall be excused from testifying or from producing any books, papers, records or memoranda in any investigation or upon any hearing, when ordered to do so by the Department or any officer or employee thereof, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to criminal penalty, but no person shall be prosecuted or subjected to any criminal penalty for, or on account of, any transaction made or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Department or any officer or employee thereof; provided that such immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

P.A. 84-126, Art. VI, § 13, eff. Aug. 1, 1985.

2014. Subpoenas—Witness fees—Contempt—Depositions

§ 14. The Department or any officer or employee of the Department designated, in writing, by the Director thereof, shall at its or his or her own instance, or on the written request of any party to the proceeding, issue sub-

poenas requiring the attendance of and the giving of testimony by witnesses, and subpoenas duces tecum requiring the production of books, papers, records or memoranda. All subpoenas issued under this Article may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the circuit court of this State; such fees to be paid when the witness is excused from further attendance. When the witness is subpoenaed at the instance of the Department or any officer or employee thereof, such fees shall be paid in the same manner as other expenses of the Department, and when the witness is subpenaed at the instance of any retailer or taxpayer to any such proceeding, the Department may require that the cost of service of the subpoena and the fee of the witness be borne by the retailer or taxpayer at whose instance the witness is summoned. In such case, the Department, in its discretion, may require a deposit to cover the cost of such service and witness fees. A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court.

Any circuit court of this State, upon the application of the Department or any officer or employee thereof may, in its discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Department or any officer or employee thereof conducting an investigation or holding a hearing authorized by this Article, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before the court.

The Department or any officer or employee thereof, or any party in an investigation or hearing before the Department, may cause the depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and, to that end, compel the attend-

ance of witnesses and the production of books, papers, records or memoranda.

P.A. 84-126, Art. VI, § 14, eff. Aug. 1, 1985.

2015. Confidentiality—Penalties

§ 15. All information received by the Department from returns filed under this Article, or from any investigations conducted under this Article, shall be confidential, except for official purposes, and any person who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a Class B misdemeanor.

Provided, that nothing contained in this Article shall prevent the Director from publishing or making available to the public the names and addresses of retailers or taxpayers filing returns under this Article, or from publishing or making available reasonable statistics concerning the operation of the tax wherein the contents of returns are grouped into aggregates in such a way that the information contained in any individual return shall not be disclosed.

And provided, that nothing contained in this Article shall prevent the Director from making available to the United States Government or the government of any other state, or any officer or agency thereof, for exclusively official purposes, information received by the Department in the administration of this Article, if such other governmental agency agrees to divulge requested tax information to the Department.

The furnishing upon request of the Auditor General, or his authorized agents, for official use, of returns filed and information related thereto under this Article is deemed to be an official purpose within the meaning of this Section.

P.A. 84-126, Art. VI, § 15, eff. Aug. 1, 1985.

2016. Review under Administrative Review Law

§ 16. The circuit court of any county wherein a hearing is held shall have power to review all final administrative decisions of the Department in administering the provision of this Article: Provided that if the administrative proceeding which is to be reviewed judicially is a claim for refund proceeding commenced under this Article and Section 2a of "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment", approved June 9, 1911, as amended,[6] the circuit court having jurisdiction of the action for judicial review under this Section and under the Administrative Review Law shall be the same court that entered the temporary restraining order or preliminary injunction which is provided for in Section 2a of "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment", and which enables such claim proceeding to be processed and disposed of as a claim for refund proceeding rather than as a claim for credit proceeding.

The provisions of the Administrative Review Law,[7] and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Department hereunder. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[8]

Service upon the Director or Assistant Director of the Department of Revenue of summons issued in any action to review a final administrative decision shall be service upon the Department. The Department shall certify the

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[6] Chapter 127, ¶ 172.

[7] Chapter 110, ¶ 3-101 et seq.

[8] Chapter 110, ¶ 3-101.

record of its proceedings if the taxpayer shall pay to it the sum of $0.75 per page of testimony taken before the Department and $0.25 per page of all other matters contained in such record, except that these charges may be waived where the Department is satisfied that the aggrieved party is a poor person who cannot afford to pay such charges.

P.A. 84-126, Art. VI, § 16, eff. Aug. 1, 1985.

2017. Rules and regulations—Informal rulings, opinions or letters—Notice—Venue—Legal representatives as parties

§ 17. The Department may make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of this Article as may be deemed expedient.

Any informal rulings, opinions or letters issued by the Department in response to any inquiry or request for an opinion from any person regarding the coverage and applicability of this Article shall be maintained as a public record, and made available for public inspection and copying. If the informal ruling, opinion or letter contains trade secrets or other confidential information, where possible the Department shall delete such information prior to publication. Whenever such informal rulings, opinions or letters contain any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act.[9]

Whenever notice to a retailer or taxpayer is required by this Article, such notice may be personally served or given by United States certified or registered mail, addressed to the retailer or taxpayer concerned at his last known address, and proof of such mailing shall be suffi-

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[9] Chapter 127, ¶ 1001 et seq.

cient for the purposes of this Article. In the case of a notice of hearing, such notice shall be mailed not less than 7 days prior to the date fixed for the hearing.

All hearings provided for in this Article with respect to a retailer or taxpayer having his principal place of business in any of the several counties of this State shall be held in the county where in the retailer or taxpayer has his principal place of business. If the retailer or taxpayer does not have his principal place of business in this State, such hearings shall be held in Sangamon County.

Whenever any proceeding provided by this Article has been begun by the Department or by a person subject thereto and such person thereafter dies or becomes a person under legal disability before the proceeding has been concluded, the legal representative of the deceased person or a person under legal disability shall notify the Department of such death or legal disability. The legal representative, as such, shall then be substituted by the Department in place of and for the person. Within 20 days after notice to the legal representative of the time fixed for that purpose, the proceeding may proceed in all respects and with like effect as though the person had not died or become a person under legal disability.

P.A. 84-126, Art. VI, § 17, eff. Aug. 1, 1985.

2018. Administrative procedures

§ 18. The Illinois Administrative Procedure Act[10] is hereby expressly adopted and shall apply to all administrative rules and procedures of the Department of Revenue under this Article, except that: (1) paragraph (b) of Section 4 of The Illinois Administrative Procedure Act[11] does not apply to final orders, decisions and opinions of the Department; (2) subparagraph (a)(2) of Section 4

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[10] Chapter 127, ¶ 1001 et seq.

[11] Chapter 127, ¶ 1004.

of The Illinois Administrative Procedure Act does not apply to forms established by the Department for use under this Article; and (3) the provisions of Section 13 of The Illinois Administrative Procedure Act [12] regarding proposals for decision are excluded and not applicable to the Department under this Article.

P.A. 84-126, Art. VI, § 18, eff. Aug. 1, 1985.

2019. Violations

§ 19. Any retailer or taxpayer who fails to make a return, or who makes a fraudulent return, or who wilfully violates any other provision of this Article or any rule or regulation of the Department for the administration and enforcement of this Article, is guilty of a Class 4 felony.

P.A. 84-126, Art. VI, § 19, eff. Aug. 1, 1985.

2020. Severability

§ 20. If any clause, sentence, Section, provision or part of this Article or the application thereof to any person or circumstance, other than the applicability of the Article to messages originating or terminating outside this State, shall be adjudged to be unconstitutional, the remainder of this Article or its application to persons or circumstances other than those to which it is held invalid shall not be affected thereby. In particular, if any provision which exempts or has the effect of exempting some class of persons or some act or privilege of sending or receiving telecommunication from the tax imposed by this Article should be held to constitute or to result in an invalid classification or to be unconstitutional for some other reason, such provision shall be deemed to be severable, with the remainder of this Article, without said provision, being held constitutional.

P.A. 84-126, Art. VI, § 20, eff. Aug. 1, 1985.

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[12] Chapter 127, ¶ 1013.

2021. Validity of ¶ 2004

§ 21. If Section 4 of this Article [13] is declared unconstitutional or invalid, no part of this Article shall be effective.

P.A. 84-126, Art. VI, § 21, eff. Aug. 1, 1985.

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[13] Paragraph 2004 of this chapter.